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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-914

C.I. Mortgage Group, a real estate investment trust,
and C.I. Planning Corporation, a corporation,
Petitioners,

vs.

Superior Court of the State of California
for the County of San Francisco,
Respondent.

(BankAmerica Realty Services, Incorporated,
a corporation,
Real Respondent in Interest).

**Opposition to Petition for a Writ of Certiorari to
the Court of Appeal of the State of California
in and for the First Appellate District**

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Real respondent in interest, BankAmerica Realty Services, Inc. (hereinafter BARSI) respectfully requests that the Court deny petitioners' application for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, in and for the First Appellate District entered in this proceeding on August 23, 1976. BARSI opposes review on the ground that the exercise of judicial jurisdiction over non-resident real estate investors that

have held over \$41,150,000 of mortgage investments in California is in accord with due process and the applicable decisions of this Court. BARSI opposes review on the further ground that petitioners have mooted the issues presented by consenting to jurisdiction.

STATUTORY PROVISIONS INVOLVED

California Code of Civil Procedure § 416.10 is set forth in the Appendix.

California Code of Civil Procedure § 416.40 is set forth in the Appendix.

California Code of Civil Procedure § 1014 is set forth in the Appendix.

California Corporations Code § 2104 is set forth in the Appendix.

STATEMENT OF THE CASE

The following facts, omitted from petitioners' Statement of the Case, are material to the questions presented and to why the Court should deny the Petition for a Writ of Certiorari.

Petitioner C.I. Mortgage Group, Inc. (hereinafter CIMG) is a Massachusetts real estate investment trust engaged in the business of financing the construction of income-producing properties. Petitioner C.I. Planning Corporation (hereinafter CIPC) advises the trust with respect to its investments.

Since 1971, petitioners have continuously financed construction projects in California. California ranks fifth in dollar amount of mortgage investments among the twenty-six states in which petitioners do business. CIMG's mortgage investments secured by real property located in California have, in the aggregate, amounted to approximately

\$41,150,000. At the end of its fiscal year 1975, CIMG held mortgage investment assets located in California amounting to approximately \$12,500,000. In 1974 and 1975 petitioners engaged in foreclosure proceedings on certain of its mortgage investments located in California.

On March 3, 1975, pursuant to California Code of Civil Procedure §§ 416.10 and 416.40, BARSI served the summons and complaint in the underlying action upon the president of CIPC and CIMG.

Petitioners made no answer but moved to quash service on the ground of lack of *in personam* jurisdiction. As detailed in petitioners' application, its motion and subsequent petitions for a writ of mandate and for a hearing were respectively denied by respondent court, the Court of Appeal, and the Supreme Court of the State of California.

On December 21, 1976, Justice Rehnquist denied petitioners' application for an order staying proceedings in respondent court.

On December 30, 1976, petitioners filed their Petition for a Writ of Certiorari, which requested review of the refusal of the Court of Appeal to compel respondent court to quash service of summons on the ground of lack of *in personam* jurisdiction.

On January 6, 1977, petitioners entered their general appearance in the underlying action by filing their Answer, Cross-complaint, and by serving notices of depositions and document inspection. Thereafter, petitioners appeared before respondent court in regard to motions for protective orders concerning the order of discovery. Pursuant to respondent court's order of February 7, 1977, petitioners exchanged documents with BARSI. On February 15, 1977 petitioners deposed BARSI's Chairman of the Board and one of its vice-presidents. Petitioners have arranged to

depose BARSI's Senior Vice-President and a former officer of BARSI in April, 1977.

REASONS FOR DENYING THE WRIT

- 1. The Order Below, Which Permitted Exercise of Judicial Jurisdiction Over Non-Residents Engaged in Continuous and Extensive Real Estate Investment Activities in California, Was in Accord with Due Process Requirements and the Applicable Decisions of This Court.**

The exercise of judicial jurisdiction on the basis of petitioners' real estate investment activities in California is consistent with the Due Process Clause of the fourteenth amendment. Due process requires that such jurisdiction, whether based upon a single forum contact or many, is reasonable and satisfies "'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). The exercise of jurisdiction is fair and reasonable when a non-resident "purposefully avails itself of the privileges of conducting activities within the forum state, thus invoking the benefits and protections of its law." *Hanson v. Denckla*, 357 U.S. 235 (1958). Thus, due process permits long arm jurisdiction to reach a non-resident with respect to causes of action that arise outside the forum, if the non-resident's business activity in the state has sufficient continuity and substance. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

Petitioners' business is the financing of construction projects with mortgage loans. Its business requires continuous and extensive activities at the project. Since 1971, petitioners have continuously conducted real estate investment activities in connection with over \$41,150,000 invested in California construction projects. Petitioners' investments in California are not mere isolated instances of making a few loans but are within the mainstream of its purposeful busi-

ness activities. Thus, petitioners' attempt to characterize such activities as "minuscule" belies the realities of construction financing by a real estate investment trust. Such realities include not only continuous and on-going involvement with the multi-million dollar project site, but also the considered possibility that the investor will look to California law for protection of its investment in the event of default and foreclosure.

In support of the contention that its real estate investment activities are insufficient to support jurisdiction, petitioners cite California Corporations Code § 6451 and *Long v. Mishicot Modern Dairy, Inc.*, 252 Cal. App. 2d 425, 60 Cal. Rptr. 432 (1967). The statute's reference to "doing business" pertains to exempting businesses from qualifying and licensing requirements and in no way pertains to determining activities that support judicial jurisdiction. The circumstances in *Long v. Mishicot Modern Dairy, Inc., supra*, are far different from the instant case. In *Long*, the land transaction involved an isolated contact with the forum and was outside the regular business activities of defendant, a Wisconsin cheese manufacturer.

Petitioners here conduct substantial and continuous business in California, they have purposefully availed themselves of the benefit of economic activities in California, and they look to California law for protection. It is fair and reasonable to hold that non-residents have submitted themselves to the jurisdiction of another state by their engaging in multi-million dollar real estate investment activities in that state. Therefore, *in personam* jurisdiction of petitioners in this case is consonant with the constitutional criteria of due process, fair play, and substantial justice.

2. The Questions Presented Are Moot.

Under California law, petitioners' general appearance in the underlying action gave respondent court the power to exercise its judicial jurisdiction. By their appearance, petitioners have voluntarily abandoned their objection to jurisdiction.

One week after filing the Petition for a Writ of Certiorari, petitioners made their general appearance in the underlying case by filing their Answer and Cross-Complaint. Simultaneously, petitioners served notices of depositions and document requests on real respondent in interest. Each of these acts constituted a general appearance under California law. California Code of Civil Procedure § 1014. *1880 Corp. v. Superior Court*, 57 Cal. 2d 840, 371 Pac. 2d 985, 22 Cal. Rptr. 289 (1962). A general appearance operates as a consent to permit respondent court to assume jurisdiction over petitioners. *Harrington v. Superior Court*, 194 Cal. 185, 228 Pac. 15 (1924). By making a general appearance, a party waives its objections to *in personam* jurisdiction. *McCorkle v. City of Los Angeles*, 70 Cal. 2d 252, 449 Pac. 2d 453, 74 Cal. Rptr. 389 (1969); *Jardine v. Superior Court*, 213 Cal. 301, 2 Pac. 2d 753 (1931).

Thus, petitioners, having submitted to judicial jurisdiction, no longer dispute it. Under California law, once a party appears it cannot avoid its waiver, and no judicial restoration is possible. *Id.*

Finally, the repeal of Corporations Code § 6451 moots the question of whether it may constitutionally operate to confer judicial jurisdiction with respect to claims unrelated to forum activities. § 6451 provided that a foreign lending institution engaged in certain forum activities was deemed to have appointed the Secretary of State as its agent for service of process. Its successor statute, Corporations Code

§ 2104, specifies that the agent is deemed appointed only for actions arising out of forum activities. Accordingly, the issue raised by petitioners regarding the constitutionality and application of § 6451 is not capable of repetition.

Review of the orders below and of the questions presented by the Petition for a Writ of Certiorari cannot affect the rights of petitioners. The questions are moot, and therefore the Court is without power to decide them. *United States v. Alaska S. S. Co.*, 253 U.S. 113, 116 (1920); *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308 (1893).

CONCLUSION

For these reasons, the Court should deny the Petition for a Writ of Certiorari to review the judgment of the Court of Appeal of the State of California.

Respectfully submitted,

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Respondent in Interest.*

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March 17, 1977

(Appendix Follows)

Appendix

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 416.10. [Service on corporation.] A summons may be served on a corporation by delivering a copy of the summons and of the complaint:

(a) To the person designated as agent for service of process as provided by any provision in Sections 201, 1502, 2105 or 2107 of the Corporations Code (or Sections 3301 to 3303, inclusive, or Sections 6500 to 6504, inclusive, of the Corporations Code as in effect on December 31, 1976, with respect to corporations to which they remain applicable);

(b) To the president or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the corporation to receive service of process;

(c) If the corporation is a bank, to a cashier or assistant cashier or to a person specified in subdivision (a) or (b); or

(d) When authorized by any provision in Sections 1701, 1702, 2110 or 2111 of the Corporations Code (or Sections 3301 to 3303, inclusive, or Sections 6500 to 6504, inclusive, of the Corporations Code as in effect on December 31, 1976, with respect to corporations to which they remain applicable); as provided by such provision.

§ 416.40. [Service on unincorporated association.] A summons may be served on an unincorporated association (including a partnership) by delivering a copy of the summons and of the complaint:

(a) If the association is a general or limited partnership, to the person designated as agent for service of process as provided in Section 24003 of the Corporations Code, or to a general partner or the general manager of the partnership;

(b) If the association is not a general or limited partnership, to the person designated as agent for service of process as provided in Section 24003 of the Corporations Code

CALIFORNIA CODE OF CIVIL PROCEDURE

or to the president or other head of the association, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the association to receive service of process;

(c) When authorized by Section 15700 or 24007 of the Corporations Code, as provided by the applicable section. [1969 ch 1610 § 3.]

§ 1014. [Appearance, what constitutes: Notices after appearance.] A defendant appears in an action when he answers, demurs, files a notice of motion to strike, files a notice of motion to transfer pursuant to Section 396b, gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. Where a defendant has not appeared, service of notice or papers need not be made upon him.

CALIFORNIA CORPORATIONS CODE

§ 2104. Foreign Lending Institutions. Any foreign lending institution which has not qualified to do business in this state and which engages in any of the activities set forth in subdivision (d) of Section 191 shall be considered by such activities to have appointed the Secretary of State as its agent for service of process for any action arising out of any such activities, and, on or before June 30th of each year, shall file a statement showing the address to which any notice or process may be sent in the manner and with the effect provided in Section 2111.

No foreign lending institution solely by reason of engaging in any one or more of the activities set forth in subdivision (d) of Section 191 shall be required to qualify to do business in this state nor be subject to (a) any of the pro-

CALIFORNIA CORPORATIONS CODE

visions of the Bank and Corporation Tax Law (commencing with Section 23001) of the Revenue and Taxation Code or (b) any of the provisions of this code or the Financial Code or Insurance Code relating to qualifications for doing or transacting business in this state or to requirements pertaining thereto or to the effects or results of failure to qualify to do business in this state. Leg.H. 1975 ch. 682, 1976 ch. 641, effective January 1, 1977.